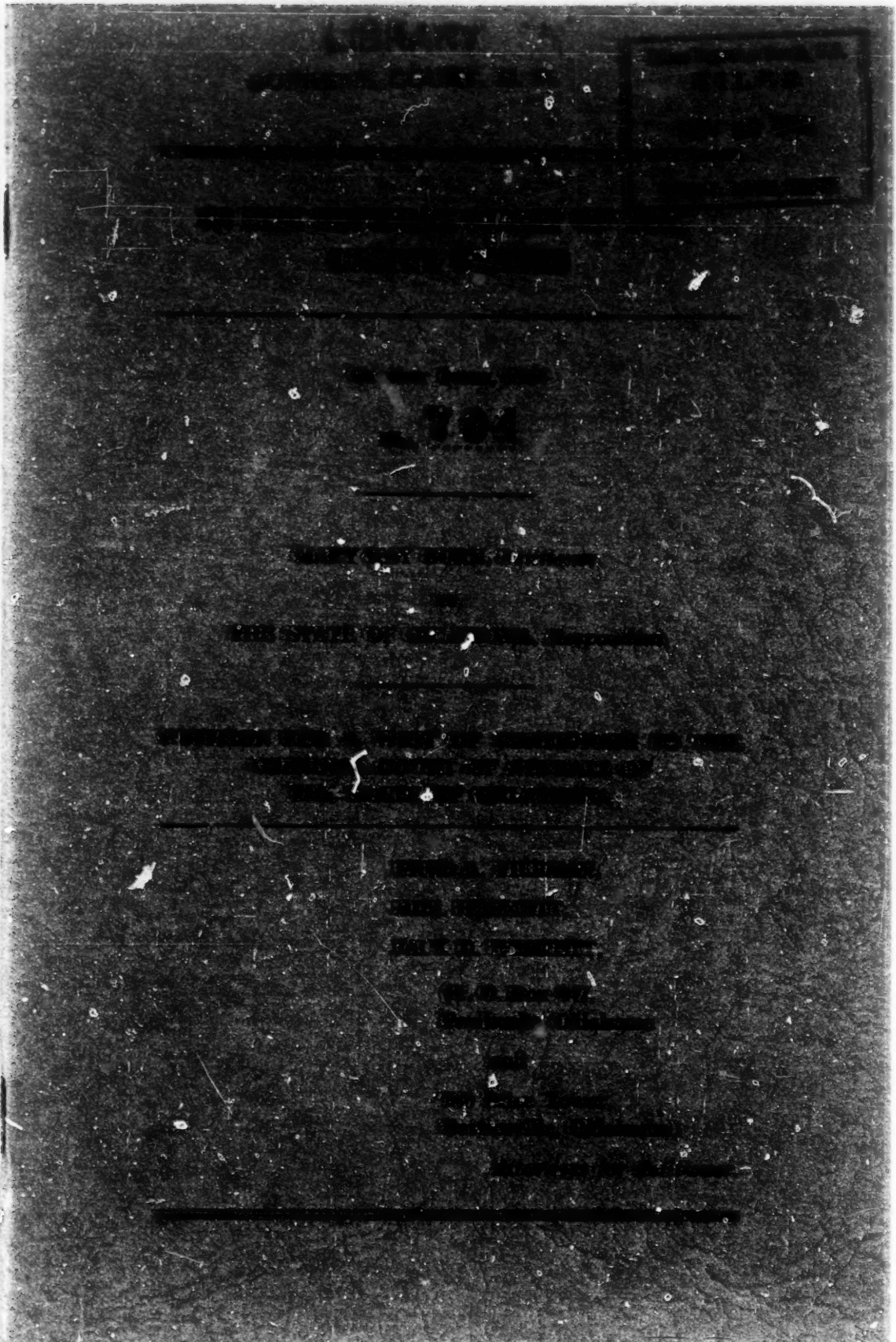

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Miscellaneous:

Oklahoma Bar Journal, Vol. 35, page 426 2

Alabama Law Review, Vol. 2, pages 40-60 8

Corpus Juris Secundum, Vol. 27, Sec. 29(1), page 725 9

Oklahoma Probate Law & Procedure, Vol. 1, Sec. 33, pages 29-30 9

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. .....

MARY KAY BORN, *Petitioner,*

vs.

THE STATE OF OKLAHOMA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE CRIMINAL COURT OF APPEALS OF THE STATE OF OKLAHOMA

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Oklahoma, entered the 4th day of March, 1964.

OPINIONS BELOW

The District Court of Washington County, State of Oklahoma issued no opinion, said judgment being based entirely upon a jury verdict, but the Court of Criminal

Appeals of the State of Oklahoma issued its opinion on the said 4th day of March, 1964, and while same was not officially reported, the syllabus was set out in 35 *Okla. B. J.* 426.

JURISDICTION

The judgment of the Court of Criminal Appeals of the State of Oklahoma was pronounced as aforesaid on the 4th day of March, 1964. Petitioner's first petition for rehearing was denied on the 13th day of May, 1964, and her second petition for rehearing was denied on the 23rd day of September, 1964. The jurisdiction of this Court is invoked under 28 *U. S. C. A.* § 1257(3).

Article 7, Sec. 1 of the Constitution of Oklahoma provides: "The judicial power of this State shall be vested in the Senate, sitting as a court of impeachment, a Supreme Court, District Courts, County Courts, Courts of Justices of the Peace, Municipal Courts, and such other courts, commissions or boards, inferior to the Supreme Court, as may be established by law."

Under 2 *Okla. Stat. Ann.* § 40, the following provisions place the appellate jurisdiction of all criminal cases in the Court of Criminal Appeals, to wit: "The Criminal Court of Appeals shall have exclusive appellate jurisdiction, co-extensive with the limits of the State, in all criminal cases appealed from the district, superior and county courts, and such other courts of record as may be established by law."

It is well settled that when the Court of Criminal Appeals was established by law with exclusive appellate jurisdiction in criminal cases, such jurisdiction ceased on the part of the Supreme Court of Oklahoma and the Court of Criminal Appeals became in fact and in law the Supreme Court of the State of Oklahoma in all criminal cases. *Corley* v. *Adair County Court*, 10 Okla. Cr. 104, 134 Pac. 835 (1913); *Buck* v. *Dick*, 27 Okla. 854, 113 Pac. 930 (1911).

On the 23rd day of September, 1964, the presiding judge of the Court of Criminal Appeals of the State of Oklahoma issued an order to stay the mandate in this case so that this petition might be filed in this Court. The presiding judge thereby made the judgment of the Court of Criminal Appeals final and under Rule 17 of that court, the second petition for rehearing having been denied, no further motions or applications on behalf of petitioner could be filed in said court except that said presiding judge stayed the filing of the mandate until the 29th of November, 1964, pending the filing of this petition.

QUESTIONS PRESENTED

Whether it violates the Due Process Clause of the Fourteenth Amendment for the trial court in a criminal case to allow an attorney to act as a special prosecutor when said attorney is in fact representing persons with a pecuniary interest in obtaining a conviction against the accused.

Whether it violates the Due Process Clause of the Fourteenth Amendment for the trial court in a criminal case to allow into evidence the results of a blood test taken from the accused after she was placed under sedation with a drug forcing "cooperation",

(i) where the doctor who administered same purported to be acting as the family doctor.

(ii) where the same doctor after testifying that said drug forced cooperation, testified that the accused refused to allow him to take the test but later allowed the hospital manager to perform same, and

(iii) where the results of said test are offered to support the State's theory of the case that the accused shot and killed the deceased while in a drunken rage.

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

I. Procedural History of the Case.

The petitioner was charged with the crime of murder in violation of 21 *Okla. Stat. Ann.* § 701 on the 26th day of July, 1964, in the District Court of Washington County, State of Oklahoma, after having been bound over to said district court for trial on said charge by the justice on preliminary hearing. A trial was commenced on the 11th day of September, 1962, in said district court

and not concluded until the 19th day of September, 1962, when the jury returned a verdict of guilty of the lesser included offense of manslaughter in the first degree, a violation under 21 *Okla. Stat. Ann.* § 711. Exception was taken to the verdict but sentence was set for and pronounced on the 27th day of September, 1962. The petitioner was sentenced to seventeen years in prison, according to the jury's recommendation.

After a motion for a new trial was overruled, the case was appealed to the Court of Criminal Appeals of the State of Oklahoma and the judgment of conviction of the district court was affirmed on the 4th day of March, 1964, but as the Court of Criminal Appeals stated, modified ". . . because of the last two errors discussed" [the dermal nitrate test and the special prosecutor] from seventeen years to twelve years. Petitioner's first petition for rehearing was denied on the 13th day of May, 1964, and her second petition for rehearing was denied on the 23rd day of September, 1964. Petitioner has no further remedy for appellate review in the state courts of Oklahoma.

II. The Facts Material to the Questions Presented.

On the evening of the 24th day of May, 1962, petitioner and her husband, Dr. Harold S. Born, became engaged in some disagreement (C-m. 303, 427-435), during which Dr. Born suffered a gun shot wound in the chest at close range (C-m. 231-232, 435). Said petitioner immediately summoned an ambulance and the victim was rushed to the hospital (C-m. 87-88, 436).

At the hospital after it was determined that Dr. Born was dead, Dr. C. L. Johnson, Jr., a close friend of the deceased and the Born family physician (C-m. 180-181), had petitioner taken to the nurses' station (C-m. 183), where he began to quiz her about what had happened (C-m. 184). Shortly, he directed the administration of sparine (C-m. 183), a drug which he testified at the trial forced "cooperation" (C-m. 186). Thereafter, petitioner was taken to a hospital room and asked to allow a blood test but refused (C-m. 190). Subsequently, she allowed the hospital administrator to take the test (C-m. 155-156). The trial court allowed the result of the blood test to be introduced into evidence over the objection of defense counsel (C-m. 250).

Throughout the trial of the case a special prosecutor was permitted to assist the State and in critical instances allowed to take over the control of same by taking charge of the cross examination of petitioner and others and much of the direct examination (C-m., 86, 179, 228, 289, 441, 634, 673, 674, 678, 794, 796. In addition, the special prosecutor closed the argument for the State (C-m. 831). All of the special prosecutor's activity was over the objection of the petitioner at the commencement of the suit. Said objection was overruled and she was not permitted to show that said special prosecutor represented clients whose estates would be enhanced by her conviction (C-m. 24-31).

III. Federal Questions Raised in the Trial Court and Before the Court of Criminal Appeals.

(A) In Trial Court:

When the petitioner made an objection to the special prosecutor at the commencement of the suit her objection was overruled and she was not permitted to show that said special prosecutor represented clients whose estates would be enhanced by her conviction (C-m. 24-31) and hence raise the constitutional question involved.

When petitioner made her objection regarding the introduction of the blood test, she pointed out that ". . . there had been no proper foundation laid for the taking or submission for a blood test." Here, the obvious lack of the constitutional requirement for consent to the submission was sufficiently raised but the trial court overruled the objection (C-m. 250).

(B) In the Court of Criminal Appeals:

A petition in error was duly filed in the Court of Criminal Appeals and subsequently a brief was filed in support thereof. Said brief reminded the Court that the constitutions of both Oklahoma and the United States required that a person charged with an offense have a fair and impartial trial. It further questioned the introduction of the blood test and the trial court's holding that allowed the special prosecutor to appear in the case.

In the two petitions for rehearing, the constitutional questions were clearly presented and especially is this

so in the petitioner's second petition for rehearing. The special prosecutor's pecuniary interest in a conviction of the petitioner which was unquestionably established in the oral argument on the original brief and criticized by the Court of Criminal Appeals in its opinion, the lack of actual consent concerning the blood test, and the unreliability of the Dermal Nitrate Test were all challenged on the basis of being violative of the Fourteenth Amendment of the United States Constitution.

ARGUMENT

I.

Certiorari should be Granted in the Instant Case because an Important Question Affecting the Prosecution of Criminal Cases and the Rights of Accused under the Fourteenth Amendment is Involved: The Doctrines of the Oklahoma Court of Criminal Appeals in the *Hall* case and the Nebraska Supreme Court in the *Fiege* case Need to be Approved and Vitalized for all Citizens of the United States Facing Prosecution under a Criminal Charge.

The proper functioning of criminal justice requires that the public prosecutor, a quasi-judicial officer, should act not as a partisan eager to convict, but as an officer of the Court, whose duty it is to aid in arriving at the truth in every case. *Snelson et al.* v. *Oklahoma*, 13 Okla. Cr. 88, 162 Pac. 444 (1917); also see, 2 *Ala. L. Rev.* 40-60 (1949).

The "avenger of the blood" doctrine of Moses' time, set out in 19 *Deuteronomy* 10-13, and "evil for evil" as a

jurisprudential policy have long been cast aside by justice seeking societies and replaced with concepts of fair play, standards of justice and due process of law. *U. S. Const., Amend.* 14; *Okla. Const., Art. II,* § 7; 4 *Blackstone Commentaries* 188; 1 *Select Essays in Anglo-American Legal History* 88-107.

Special prosecutors have become a not infrequent occurrence in the prosecution of criminal cases in the nation. Most jurisdictions allow a private prosecutor where the motive of said attorney and his clients is simply to aid the State in securing a conviction. 27 *C. J. S.* § 29(1), 725. However, justice and fair play under our standards of due process of law require that a special prosecutor representing clients with a special or pecuniary interest in obtaining the conviction of the accused be forbidden. *Fiege* v. *Nebraska,* 93 Neb. 610, 142 N. W. 278 (1913); *Hall* v. *Oklahoma,* 24 Okla. Cr. 97, 217 Pac. 229 (1923).

After reciting the records of the Court Clerk of Washington County, Oklahoma, the Court of Criminal Appeals in its typewritten opinion herein stated that the interest of the special prosecutor and his clients "was profound". The Court stated, "If defendant had been exonerated, she would have inherited a wife's share, whereas a conviction would have precluded her from participating in the estate." See, 84 *Okla. Stat. Ann.* § 231; Huff, 1 *Okla. Prob. L. & Proc.* § 33, 29-30. In such event, the special prosecutor's clients, children of decedent by a former marriage, would benefit as the remaining heirs of the decedent's estate.

In the *Fiege* case, *supra*, the special prosecutor was employed by one of the State's principal witnesses who in the event of the accused being acquitted, was fearful of being charged with the murder. The Nebraska Court held, "Public prosecutors . . . owe no greater obligation to the public than to a defendant . . . and they should as zealously protect one as the other." The Court continued, ". . . it must appear to the mind at once, that the appointment of the partisan prosecutor was not in the interest of the fair and impartial trial guaranteed by the Constitution."

In the *Hall* case, *supra*, the special prosecutor who participated in a prosecution for the crime of selling mortgaged property, had originally assisted his client in a transaction with defendant concerning certain notes and mortgages. Notwithstanding defendant's failure to raise the point at the trial, the Court of Criminal Appeals reversed the conviction by holding that a prosecution for the purpose of forcing adjustment of contractual claims between private individuals does not afford the defendant ". . . such a fair and impartial trial as is contemplated by law."

In the instant case, the special prosecutor's participation in the case was more than a mere appearance. He took an active part, arguing many of the points of law, and conducted much of the inquiry, including the cross examination of petitioner, and made the State's closing argument, (C-m. 86, 179, 228, 289, 441, 634, 638, 674, 678, 794, 796, 831, etc.). His zeal for a conviction was apparent throughout the trial but it was never more obvious

then in his closing argument when in support of his premises that the petitioner shot deceased in bed, he introduced for the first time a statement which was completely fabricated by his hope for conviction and which an examination of the case-made from cover to cover will not disclose any evidence from which even an inference might be raised that same occurred. Yet, he told the jury ". . . she pointed it [the gun] at him and he said, 'you wouldn't shoot me. I'm not afraid of you or your gun.'" (C-m. 850)

The Court of Criminal Appeals in its typewritten opinion herein pointed out that much of the case law regarding prohibition of special prosecutors is based upon statutes. Such legislation, forming a pattern of fairness and decency that has been woven from common experience into the fabric of legislative law, is but public recognition that a special prosecutor representing interests that seek to benefit by a conviction, cannot be supposed to govern himself by that standard of a quasi-judicial nature, required of public prosecutors.

The mere fact that the Oklahoma Legislature has not, as yet, enacted a statute prohibiting such unethical participation, does not resolve the issue. The Court of Criminal Appeals in its typewritten decision herein found: "Legislative history strongly indicates that said Statutes were based upon the Constitutional right of a person charged with a crime to be prosecuted by a fair and impartial prosecutor." This constitutional right is guaranteed to all citizens and a failure to afford them such a

fundamental right of fairness, is a denial of due process of law under the Fourteenth Amendment of the United States Constitution which does not depend upon or vary with local legislation. *Herbert* v. *Louisiana*, 272 U. S. 312, 47 S. Ct. 103, 71 L. Ed. 270 (1926).

Where as here, the trial court allowed an attorney to act as a special prosecutor when said attorney was in fact representing persons with a pecuniary interest in a conviction of the accused, the trial itself becomes a mockery of our system and in a complete disregard of the constitutional guarantees of due process of law. The special prosecutor was in truth worse than "the avenger of the blood" for his hire was by private clients, the vultures of misfortune, whose estates stood to be increased by the conviction of the defendant. Exposed, the employment is naked of all honor. A conviction under such circumstances is marked with a scar of governmental power ursurped by private interests. It is born outside the wedlock of fundamental justice and due process of law. Such a conviction in our jurisprudential system should not stand.

The interest of the special prosecutor and his clients was to seek financial gain by means of securing petitioner's conviction. The Court is respectfully reminded that such action is foreign to the traditional concepts of the American people's ideas of fair play and fundamental rights which are synonymous with due process of law. *Galvin* v. *Press*, 347 U. S. 522, 74 S. Ct. 737, 98 L. Ed. 911 (1954). Regardless, due process is not confined within a permanent catalog of what may at a given time be deemed

the limit or the essentials of fundamental rights since it is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. *Frank* v. *Maryland*, 359 U. S. 360, 79 S. Ct. 804, 3 L. Ed. 2d 877 (1959).

When fundamental rights guaranteed by the constitution have been denied an accused in the trial of a criminal prosecution it is not enough to merely reduce the sentence as the Court of Criminal Appeals did in the instant case. The rejection of a constitutional right in the trial of a criminal case can only be remedied by a new trial.

The *Fiege* case, *supra* and the *Hall* case, *supra*, declare that the participation of a special prosecutor in a criminal prosecution, where he represents clients that seek a conviction for a personal benefit, is contrary to our notions of fair play and abridges the constitutional guaranty of a fair and impartial trial. These cases should be affirmed and in addition, a precedent should be established across this nation that would prohibit the reoccurrence of such a violation of fundamental due process of law.

II.

Certiorari should be Granted in the Instant Case because the Limitations of the Due Process Clause of the Fourteenth Amendment concerning the Procurement of Evidence from the Person of Accused through Scientific Test should be Amplified and Restated in the Application of Criminal Investigations.

The coercion employed through the use of the drug sparine, forcing "cooperation", made involuntary extraction of blood from petitioner to establish drunkenness, is violative of the Due Process Clause and thereby made said evidence inadmissible. *Rochin* v. *California*, 334 U. S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952); *Alexander* v. *Oklahoma*, 305 P. 2d 572 (Okla., 1957).

All witnesses agree that the petitioner refused to submit to the blood test upon being asked by Dr. C. L. Johnson, Jr. (C-m. 155-156, 190). Petitioner had already been injected with the drug sparine forcing her cooperation (C-m. 155-156, 183) which surely overcame her resistance to have faculty enough to ask for an attorney. The Court of Criminal Appeals in its typewritten opinion stated that petitioner ". . . agreed that Mrs. Hannum could take the blood for the test" and that thereby the petitioner had given her consent. Under such a view, the court correctly concluded that it was not error for the trial court to allow the results of the test in evidence. However, the court overlooked the glaring fact that according to the State's case in chief, the petitioner had been forced to submission by the drug sparine which compelled "cooperation."

Can it be said that the law of the land would allow the "drugging" of an accused with medication that forces "cooperation" and thereby his submission to a blood test? How can it be pretended that such conduct is not merely the "rack and screw" of modern times? Surely such extortion of consent is more humane than the rack and screw but this begs the question. The heart of the issue is whether it is "conduct that shocks the conscience" thereby making same unconstitutional. *Rochin* case, *supra; Alexander* v. *Oklahoma, supra; City of Barron* v. *Covey,* 271 Wis. 10, 72 N. W. 2d 387 (1955).

Petitioner suggests that in light of the history of the Due Process Clause, the authorities, and the essentials of fundamental rights as conceived by the people of this nation, that to allow the admission of evidence so obtained is squarely in conflict with the Fourteenth Amendment of the United States Constitution. To allow such activity is to open the door to "modern day inquisitors" whose investigations would invade the very core of our concepts of constitutional safeguards and leap the gap backwards to the Dark Ages through the use of modern science. All principles would be cast aside and advancement from those early times would be held for naught under the guise that the mode now employed was humane. Such rationale is not acceptable in a democracy. Consent must be free and voluntary, not the result of the medics' needle any more than the rack and screw of the inquisitor.

The evidence regarding the blood test should have been excluded on constitutional grounds.

WHEREFORE, Petitioner respectfully requests that a writ of certiorari issue to the Court of Criminal Appeals of the State of Oklahoma.

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CERTIFICATE OF SERVICE

I, the undersigned attorney for petitioner, do hereby certify that I served a true and correct copy of the foregoing petition for writ of certiorari upon the respondent at the office of the Honorable Charles Nesbitt, Attorney General of the State of Oklahoma, by depositing same in the mail at the Post Office in Bartlesville, Oklahoma with class postage thereon fully prepaid.

Fred A. Tillman